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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Anwar Armando Barragan-Flores,

13 Defendant.
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No. CR-16-00184-001-TUC-RM (LAB)

ORDER

15 In the above-captioned case, Defendant Anwar Armando Barragan-Flores pled
16 guilty to Conspiracy to Commit Bank Fraud, in violation of 18 U.S.C. § 1349, and
17 Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A. (Doc. 263.) On September
18 29, 2017, the Court sentenced Defendant to two consecutive terms of imprisonment—60
19 months for the former offense and 24 months for the latter offense—followed by a five-
20 year term of supervised release only for the former offense. (*Id.*) Additionally, the Court
21 ordered that Defendant and his co-defendants jointly and severally pay \$196,613.16 in
22 restitution to the victims identified in this case. (*Id.* at 2.) Now pending before the Court
23 is Defendant’s Amended Motion for Relief Under 18 U.S.C. § 3582(c)(1)(A)(i). (Doc.
24 270.) Defendant asks that the Court reduce his custodial sentence to time served and
25 convert the remainder of his 84-month term to supervised release,¹ on the grounds that

26 ¹ Defendant specifically asks that his custodial sentence be converted to supervised
27 release “with home confinement [but] only if he were to remain in the United States
28 (which he does not wish to do).” (Doc. 272 at 4; *see also* Doc. 270 at 20.) However, the
Court is without authority to transfer Defendant to home confinement. *United States v.*
Carlucci, 2020 WL 2527013, at *3 (D. Ariz. May 18, 2020), *aff’d*, 848 F. App’x 339 (9th
Cir. 2021) (“While the CARES Act gives the BOP broad discretion to expand the use of

extraordinary and compelling reasons exist warranting this requested relief. (*Id.* at 2, 21; *see also* Doc. 272 at 4.) Namely, Defendant argues that his age and pre-existing medical conditions place him at a heightened risk of severe illness and/or death if he contracts COVID-19. (Doc. 270 at 5, 15–16.) The Government filed a Response in opposition to Defendant’s Motion (Doc. 271), and Defendant filed a Reply (Doc. 272). For the following reasons, the Court will deny Defendant’s Motion.

I. Legal Standard

A court may reduce a term of imprisonment upon a defendant’s motion, after considering the factors set forth in 18 U.S.C. § 3553(a), if: (1) the defendant has fully exhausted his administrative remedies, (2) “extraordinary and compelling reasons” warrant the reduction, and (3) the reduction is consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A). A defendant exhausts his administrative remedies by appealing a failure of the Bureau of Prisons to bring a motion on his behalf or by the lapse of 30 days from the receipt of a request for compassionate release by the warden of the defendant’s facility. *Id.*

The Ninth Circuit recently held that the current version of U.S.S.G. § 1B1.13 is not an applicable policy statement for purposes of 18 U.S.C. § 3582(c)(1)(A) motions filed by a defendant. *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (*per curiam*). The Ninth Circuit explained that “[t]he Sentencing Commission’s statements in U.S.S.G. § 1B1.13 may inform a district court’s discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding.” *Id.* Therefore, the Court will rely on U.S.S.G. § 1B1.13 as persuasive but non-binding authority for purposes of evaluating the present Motion.

Both 18 U.S.C. § 3582(c)(1)(A) and U.S.S.G. § 1B1.13 direct courts to consider the sentencing factors set forth in 18 U.S.C. § 3553(a). U.S.S.G. § 1B1.13 further provides that a defendant’s sentence may be reduced only if it is determined that the

home confinement during the COVID-19 pandemic, the Court lacks jurisdiction to order home detention under this provision.”).

1 defendant is “not a danger to the safety of any other person or to the community, as
 2 provided in 18 U.S.C. § 3142(g).” The application notes to U.S.S.G. § 1B1.13 describe
 3 specific circumstances that present “extraordinary and compelling reasons” for a sentence
 4 reduction, including when a defendant is “suffering from a serious physical or medical
 5 condition . . . that substantially diminishes the ability of the defendant to provide self-care
 6 within the environment of a correctional facility and from which he or she is not expected
 7 to recover.” U.S.S.G. § 1B1.13, cmt. n.1.

8 The factors to be considered in determining a sentence under 18 U.S.C. § 3553(a)
 9 include “the nature and circumstances of the offense and the history and characteristics of
 10 the defendant,” the sentencing range established by the Sentencing Guidelines, the need
 11 to avoid unwarranted sentence disparities among similarly situated defendants, and the
 12 need for the sentence imposed:

- 13 (A) to reflect the seriousness of the offense, to promote respect for the law, and to
 14 provide just punishment for the offense;
- 15 (B) to afford adequate deterrence to criminal conduct;
- 16 (C) to protect the public from further crimes of the defendant; and
- 17 (D) to provide the defendant with needed educational or vocational training,
 18 medical care, or other correctional treatment in the most effective manner.

19 18 U.S.C. § 3553(a).

20 The factors to be considered in assessing dangerousness under 18 U.S.C. §
 21 3142(g) include the nature and circumstances of the defendant’s offense; the weight of
 22 the evidence against the defendant; the nature and seriousness of the danger to any person
 23 or the community posed by the defendant’s release, and the defendant’s history and
 24 characteristics, including “character, physical and mental condition, family ties,
 25 employment, financial resources, length of residence in the community, community ties,
 26 past conduct, history relating to drug or alcohol abuse,” and criminal history. 18 U.S.C. §
 27 3142(g).

28 **II. Discussion**

On November 25, 2020, Defendant submitted a Compassionate Release/Reduction
 in Sentence request to the warden of the Giles W. Dalby Correctional Facility in Post,

1 Texas, where he is housed. (Docs. 267 at 1; Doc. 267-1 at 2–8.) On December 14, 2020,
2 the warden denied Defendant’s request. (Doc. 267-1 at 8.) The parties do not dispute that
3 Defendant satisfied the exhaustion requirement under 18 U.S.C. § 3582(c)(1)(A) prior to
4 filing the instant Motion. (*See* Docs. 270 at 4 and 271 at 6.) The Court will thus accept
5 that Defendant has exhausted his administrative remedies. *See* 18 U.S.C. § 3582(c)(1)(A).

6 Although there is no dispute as to Defendant’s exhaustion efforts, the parties
7 dispute whether Defendant’s early release is warranted under 18 U.S.C. §
8 3582(c)(1)(A)(i). While Defendant argues that his vulnerability to COVID-19 due to his
9 age, medical conditions, and incarceration constitute extraordinary and compelling
10 reasons warranting his early release (Doc. 270 at 5, 15–16), the Government argues that
11 Defendant’s present circumstances and the speculative possibility of contracting COVID-
12 19 are “far closer to ordinary than ‘extraordinary.’” (Doc. 271 at 8–10). Specifically,
13 Defendant points to, among other health issues, his heart condition and being overweight,
14 citing that both are CDC-identified conditions that make him more likely to get severely
15 ill from a COVID-19 infection. (Doc. 270 at 15–16; Doc. 272 at 2.) Further, Defendant
16 argues that, as an incarcerated person, “it is impossible . . . to follow the CDC’s
17 recommendations to protect himself from exposure to [the virus].” (Doc. 270 at 16; *see*
18 *also* Doc. 272 at 3.) In opposition, the Government argues that Defendant neither suffers
19 from a terminal illness nor demonstrates that he suffers from a serious medical condition
20 that substantially diminishes his ability to provide self-care within a correctional facility
21 and from which he is not expected to recover. (Doc. 271 at 7, 9.) Moreover, the
22 Government points to Defendant’s lack of evidence that he would be less likely to
23 contract COVID-19 if released and the efforts of the Federal Bureau of Prisons (“BOP”) to
24 protect the health of inmates and curtail the spread of the virus in its facilities,
25 including its efforts in transferring vulnerable inmates to home confinement under its
26 now broader statutory authority and in vaccinating its staff and inmates. (*Id.* at 3–5, 10.)

27 Having considered Defendant’s age, medical conditions, the risk of a COVID-19
28 infection while in BOP’s custody, and the guidance set forth in U.S.S.G. § 1B1.13, the

1 Court cannot conclude that the arguments presented by Defendant rise to the level of
 2 extraordinary and compelling circumstances meriting his early release. While the Court
 3 recognizes that some of Defendant’s health issues may increase his risk of suffering
 4 severe illness if he were to contract COVID-19,² Defendant’s speculation that he may
 5 contract COVID-19 is insufficient to warrant compassionate release. *See United States v.*
 6 *Pena*, 2020 WL 7123025, at *3 (D. Ariz. Dec. 4, 2020) (recognizing “that the infection of
 7 any inmate is concerning,” but noting that “a general concern over contracting [COVID-
 8 19] is insufficient legal cause for compassionate release”). Defendant discusses the risks
 9 that COVID-19 poses to vulnerable inmates under general conditions of confinement
 10 within detention facilities nationally (Doc. 270 at 10–14) and presents statistics regarding
 11 different prisons (Doc. 267 at 8–9), but he provides limited information about his
 12 conditions of confinement at the Giles W. Dalby Correctional Facility. Defendant alleges
 13 that other inmates “breath[e] around him,” that asymptomatic inmates go unnoticed due
 14 to a lack of “compound[-]wide testing,” and that common surfaces and other areas are
 15 cleaned only once a day, without disinfectants. (*Id.* at 7–8.) These allegations and
 16 Defendant’s discussion about general conditions of confinement inform the Court about
 17 nothing more than general threats to incarcerated persons and speculation as to whether
 18 COVID-19 will spread at Defendant’s facility, whether he will contract it, and whether he
 19 will suffer a severe case. *See United States v. Bolze*, 2020 WL 6151561, at *11 (E.D.
 20 Tenn. Oct. 20, 2020), *aff’d*, 2021 WL 1978362 (6th Cir. Apr. 6, 2021) (finding that
 21 “speculation as to whether COVID-19 will spread through Defendant’s detention facility,
 22 whether Defendant will contract COVID-19, and whether he will develop serious
 23 complications, does not justify the extreme remedy of compassionate release,” even after
 24 considering Defendant’s argument “that some courts have granted compassionate release
 25 to inmates in facilities where there are no confirmed cases of COVID-19, perhaps in
 26 some circumstances due to a lack of adequate testing”) (internal quotations and
 27 alterations omitted). Further, Defendant’s most recent medical records reflect that he has

28 ² *See* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

1 received medical care, medication, and medical education from medical personnel at his
2 facility (Doc. 267-1 at 11–16), providing no indication that Defendant will not receive
3 adequate medical care while in custody. The Court finds that Defendant has not met his
4 burden of showing extraordinary and compelling reasons warranting his early release.

5 Even if Defendant had met his burden, the Court nonetheless finds that his early
6 release is unwarranted because the factors set forth in 18 U.S.C. § 3553(a) and the danger
7 Defendant poses to the public weigh against his release. The nature and circumstances of
8 Defendant’s offenses were serious—via a conspiracy involving approximately 25 other
9 individuals, Defendant led a scheme to defraud various financial institutions and to obtain
10 money or other property from them by purchasing the stolen identities of numerous
11 people, including their credit card account information, to manufacture counterfeit credit
12 cards and use them to purchase items of value, all of which resulted in the loss of
13 hundreds of thousands of dollars. (Doc. 112 at 9–13.) Moreover, Defendant did not just
14 play a role in these offenses—he directed the activities of his co-conspirators in all
15 respects of the scheme. (*Id.* at 10.) Particularly troubling is the fact that Defendant,
16 shortly after his arrest and while in custody, instructed his wife to delete account
17 information from his phone and laptop to destroy and conceal evidence of his offenses,
18 and he then followed up to confirm that the information had been deleted. (*Id.* at 13.)

19 Although Defendant admits that the nature and circumstances of his offenses
20 qualified him for the sentence this Court imposed in 2017, he argues that “the sentencing
21 purpose of just punishment does not warrant a sentence that includes exposure to a life-
22 threatening illness.” (Doc. 270 at 19–20.) Further, Defendant argues that the time he has
23 already served is sufficient to satisfy the purposes of sentencing. (*Id.* at 19.) As noted
24 above, Defendant’s custodial setting during this pandemic does not sufficiently justify his
25 early release, *see* discussion *supra* p. 5–6, especially as progress within the federal prison
26 system and in the community is being made with respect to COVID-19. Additionally, in
27 imposing his sentence, the Court already departed—by 27 months—from the custodial
28 sentence recommended by both U.S. Probation and the Government. (Doc. 208 at 17;

1 Doc. 207 at 13.) For these reasons, the Court finds that the remaining term of Defendant's
2 custodial sentence will continue to provide him with needed correctional treatment,
3 remains suitably tailored to provide just punishment for his offenses, promotes respect for
4 the law, and will deter him from future criminal conduct.


5 Finally, although the dangerousness finding does not bind this Court's decision,
6 *see Aruda*, 993 at 799, 802, the Court agrees with the Government's assessment under 18
7 U.S.C. § 3142(g) and cannot conclude that Defendant's statements of remorse, efforts to
8 educate and rehabilitate himself while incarcerated, plans to live in Mexico with his wife
9 and help his mother, job offer, or any other grounds that he submits, mitigate his
10 continuing danger to the public if released. (Doc. 267 at 9–11; Doc. 270 at 20–21; Doc.
11 272 at 2–3.) The most significant factor leading the Court to conclude that Defendant
12 remains a danger to the public is the nature and circumstances of his offenses. *See*
13 discussion *supra* p. 6. As previously mentioned, Defendant's role in the conspiracy was
14 not minor—he dealt with foreign suppliers, over the Internet, to obtain the stolen credit
15 card data; directed the making of the counterfeit credit cards, including the details
16 imprinted on them; and directed what merchandise should be purchased with the
17 counterfeit credit cards, all to unlawfully enrich himself and his co-conspirators.
18 (Doc.112 at 10–11; Doc. 213 at 5.) The Court notes that Defendant and his co-
19 conspirators committed the instant offenses while residing in Hermosillo, Sonora, Mexico
20 (Doc. 112 at 9), a city that Defendant described as being “rampant” in the fraudulent
21 credit card business (Doc. 213 at 8) and where he plans to live and work if released (Doc.
22 267-1 at 22; Doc. 270 at 20–21; Doc. 270-5 at 2). The Court further notes that, during the
23 time of the conspiracy, Defendant was employed (Doc. 213 at 12), and yet he nonetheless
24 led this financial scheme. For these reasons, the Court is unconvinced that Defendant
25 poses no financial danger to the public, especially now given the economic impacts
26 caused by the pandemic. *Unites States v. Fuller*, 461 F. Supp. 3d 1046, 1054 (W.D.
27 Wash. 2020) (noting, in a case where the defendant was also convicted of bank fraud and
28 aggravated identity theft, that “[d]ue to the economic impacts of the COVID-19

1 pandemic, large segments of the public have recently suffered severe financial setbacks,
2 unemployment, and other deprivations that may render them particularly vulnerable to
3 those types of fraudulent schemes”).

4 Accordingly,

5 **IT IS ORDERED** that Defendant’s Amended Motion for Relief Under 18 U.S.C.
6 § 3582(c)(1)(A)(i) (Doc. 270) is **denied**.

7 Dated this 30th day of July, 2021.

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12 Honorable Rosemary Márquez
13 United States District Judge
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